

**IN THE OFFICE OF THE STATE ENGINEER OF THE
STATE OF NEVADA**

IN THE MATTER OF APPLICATIONS 54003,)
54004, 54005, 54006, 54007, 54008, 54009,)
54010, 54011, 54012, 54013, 54014, 54015,)
54016, 54017, 54018, 54019, 54020, 54021,)
UNDERGROUND WATERS OF THE SPRING)
VALLEY HYDROGRAPHIC BASIN (184))
WHITE PINE COUNTY, NEVADA.)

INTERMEDIATE ORDER
NO. 4

GENERAL

I.

On July 7, 2006, the Southern Nevada Water Authority (SNWA) filed three motions: a Motion to Dismiss Protestants for Failure or Neglect to Prosecute Protests to the Spring Valley Applications with Reasonable Diligence; a Motion to Dismiss Individual Protest Claims Regarding Spring Valley Applications and Memorandum in Support; and a Motion to Exclude Evidence Related to Protests Against Applications in Spring Valley.

II.

In response, on July 20, 2006, the SNWA and the United States National Park Service (NPS) filed a Stipulation Regarding SNWA's Motion to Dismiss Individual Protest Claims and Motion to Exclude Evidence. Pursuant to the Stipulation these parties agreed that:

- (1) The NPS would withdraw its protest issue X, which alleges that it is unclear whether the quantity of water contemplated by the Applications is necessary and is an amount reasonably required for municipal and domestic purposes. The NPS had alleged that past open and notorious practices would indicate otherwise.
- (2) The NPS would withdraw protest issue XI, which alleges that the Applications do not clearly indicate the place of use, the description of the proposed works, estimated costs of works, number and type of units to be served or annual consumptive use. Nor is it clear that the appropriation sought is necessary and is in an amount reasonably required for the beneficial use to be served.
- (3) The NPS would withdraw protest issue XIII, which alleges that the NPS reserves the right to amend its protest as more information becomes available.

(4) The parties agreed that Tod Williams and Eric Lord are not going to be offered as expert witnesses during the administrative hearing, their reports will not be offered as expert reports, and they will not offer expert opinions.

(5) The parties also agreed that any remaining arguments are preserved and to be made at the administrative hearing, accordingly, the NPS need not oppose the motions and the SNWA waived and will not assert any failure to file an opposition.

III.

In response, on July 21, 2006, the SNWA and the United States Bureau of Land Management (BLM), the United States Fish and Wildlife Service (FWS), and the United States Bureau of Indian Affairs (BIA) filed a Stipulation Regarding SNWA's Motion to Dismiss Individual Protest Claims and Motion to Exclude Evidence. Pursuant to the Stipulation these parties agreed that as to Applications 54003 – 54021, inclusive:

(1) The BLM would withdraw the protest issue regarding air quality (BLM Protest at 3, Para. 2), which alleges that the aesthetic and biologic quality of the air resource will decline because desertification increases airborne particulars and acute problems will result during period of high winds.

(2) The FWS would withdraw the protest issue regarding comprehensive study (FWS Protest at 2), which alleges that the Fish and Wildlife Service strongly urges the State Engineer to undertake a comprehensive study of the environmental impacts to southern Nevada that the withdrawing of 800,000 acre-feet of water, the amount applied for by the Las Vegas Valley Water District, would have on the hydrologically connected basins in this area of the state prior to approving any of the applications.

(3) The BLM would withdraw the protest issue regarding amendment to the protest (BLM Protest at 3), which alleges that because it is impossible to anticipate all impacts at this time, the BLM reserves the right to amend this protest as other issues develop and as additional studies provide further information.

(4) The parties stipulated that the following persons are not being offered as expert witnesses, that their reports will not be offered as expert reports and they will not offer expert opinions: Kevin Kritz, Shawn Goodchild, Annalaura Averill-Murry, Marianne Crawford, Steve Caicco, Jay Banta, Robert Boyd, Paul Podborne, Brad Pendley, and Ray Roessel.

(5) The parties also stipulated that any remaining arguments are preserved and to be made at the administrative hearing, accordingly, the BLM, FWS or BIA need not oppose the motions and the SNWA waived and will not assert any failure to file an opposition.

IV.

On July 21, 2006, the Western Environmental Law Center (WELC), on behalf of the various Protestants it represents and Protestant Nye County filed responses in opposition to SNWA's Motions to Dismiss and Exclude Evidence.

V.

On July 28, 2006, the SNWA filed replies to the WELC's and Nye County's oppositions to its motions.

FINDINGS OF FACT

I.

A.1.¹ The Applicant moves to dismiss the National Park Service's claim as to federally reserved rights or other water rights with senior priority dates in the Great Basin National Park. The State Engineer finds the SNWA and the NPS stipulated to addressing this argument during the administrative hearing and finds that to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

II.

A.2. The Applicant moves to dismiss the Fish and Wildlife Service's claim that granting the Applications will reduce the water supply for four National Wildlife Refuges (NWR) thereby endangering plant and wildlife species, defeating the purpose of the NWR and possibly violating the Migratory Bird Treaty Act and the Endangered Species Act because none of the NWRs are located in Spring Valley and no evidence has been submitted to establish a hydrologic connection between any of the NWRs and Spring Valley. The State Engineer finds the SNWA and the NPS stipulated to addressing this argument during the administrative hearing and finds to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

¹ A.2. These numbers reference the headings in the motion.

III.

A.3. The Applicant moves to dismiss the protest claims that assert a detriment to the public interest will result from the Applications by eliminating the capability of federal agencies to fulfill federal land management responsibilities imposed by legislative action. The State Engineer finds the SNWA, the BLM and the FWS stipulated to addressing this argument during the administrative hearing and denies the request to dismiss.

IV.

A.4. The Applicant moves to dismiss the protest claim of the Sierra Club that granting the Applications would be inconsistent with the "federally owned water rights as to lands affected by this application" and that Applications 54003-54005 are located near a wilderness study area that is managed by the BLM for study for potential designation as a National Wilderness Area. The Applicant alleges that this protest claim is moot because the areas associated with Applications 54003-54005 were excluded from the wilderness area and are located beyond the eastern boundary of the Fortification Range Wilderness Study Area. The State Engineer denies the request to dismiss.

V.

A.5. The Applicant moves to dismiss the protest claims by White Pine County and the City of Ely that the Applications will conflict with and interfere with the ground water sought in previously filed applications in Spring Valley. The State Engineer finds that most of the previous applications filed for the appropriation of ground water in Spring Valley have been addressed since the time of the filing of the protests, and White Pine County's applications were previously denied. The State Engineer finds Applications 32030, 32031, 32032 and 32036 are still pending, are senior to the Applications under consideration here, will need to be addressed prior to any decision on these specific applications and denies the request to dismiss.

VI.

A.6. The Applicant moves to dismiss the claim by the Ely Shoshone Tribe as to issues under the Treaty of Ruby Valley. The State Engineer finds the SNWA and the BIA stipulated to addressing this argument during the administrative hearing and denies the request to dismiss.

VII.

A.7. The Applicant moves to dismiss the Rountree's protest claims relating to DX Ranch in Snake Valley alleging that they do not implicate any water rights in Spring Valley. As noted in the Protestant's Response, the State Engineer inadvertently failed to identify in the Intermediate Order and Hearing Notice that the Rountree's filed protests in Spring Valley as well as Snake Valley. The Rountree's response indicates that the DX Ranch is located in Spring Valley and they have water rights in Spring Valley. The State Engineer finds to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

VIII.

B.1 and B.2. The Applicant moves to dismiss or limit the State Engineer's review of any protest claim that addresses whether the proposed transfer is environmentally sound. A review of the protest claims referenced address issues such as threatened and endangered species, destruction of environmental, ecological, scenic and recreational values the state holds in trust for its citizens, and purposes for which lands are managed under the Federal Land Use Policy Act. The Applicant asserts that the State Engineer is not required to duplicate the environmental review that other state and federal agencies are obliged to complete by state and federal law. The Applicant does note however that NRS § 533.370(4) - (5) [sic - NRS § 533.370(5) - (6)] require the State Engineer to determine whether the use of water as proposed under an application will threaten to prove detrimental to the public interest and whether an interbasin transfer of water is environmentally sound as to the exporting basin.

The SNWA, the BLM, the NPS and the FWS stipulated to addressing this argument during the administrative hearing. Protestants Abigail Johnson, Katherine and William Rountree, Toiyabe Chapter of the Sierra Club, John Tryon and White Pine County responded that NRS § 533.370(5) [sic] requires the State Engineer to consider environmental and economic impacts to the source basin and argue that both scenic and recreational values are routinely considered as environmental and economic values that need to be considered.

Both the Applicant and WELC review the legislative history leading up to the enactment of the current NRS § 533.370(6) (interbasin transfers) and NRS § 533.368 (hydrological, environmental and other studies). That history indicates the legislation was not intended to create an environmental impact process out of every interbasin transfer of water, and that care

needed to be taken to avoid requirements that would be duplicative of Environmental Impact Statements. Nevada Revised Statute § 533.368 provides the State Engineer with the authority to order a hydrological study, an environmental study or any other study he determines is necessary before he makes a final determination on an application. These provisions were not intended to be redundant with studies previously done or to be done, but if the State Engineer determines additional information may be necessary, he has the authority to order studies to be done. The State Engineer finds Nevada Revised Statute § 533.370(6) requires him to consider environmental issues; however, the perspective he is to focus on is that of hydrologic issues and the environmental review under the water appropriation process is not to be duplicative of the environmental review conducted pursuant to federal law. The State Engineer finds while he does not believe the hydrologic focus of his environmental review considers scenic and recreational values, these factors may have some bearing on whether the use of the water is an appropriate long-term use that will not unduly limit the future growth and development of the basin from which the water is exported. The State Engineer finds he will not prejudge the evidence and denies the request to dismiss the protest claim.

IX.

B.3. The Applicant moves to dismiss all protests claims that are based on the assertion that the appropriations will create dust, negatively impact the air quality in the Spring Valley region, and potentially violate the Clean Air Act or NRS chapter 445. The BLM stipulated to withdraw this protest issue. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County argue that the State Engineer should take evidence at the hearing on these matters and then make his decision. The State Engineer agrees that whether there will be violations of the Clean Air Act or other Nevada air quality laws is relegated to another agency of government and is not within his purview. The State Engineer finds NRS § 533.370(6) requires the State Engineer to consider environmental issues; however, the perspective the State Engineer is to focus on is that of hydrologic issues and dismisses the protest claim.

X.

B.3 (should be B.4 as there are two B.3s in motion). The Applicant moves to dismiss all protest claims that are based on the assertion that the appropriations may impair the water quality and potentially violate the Clean Water Act or Nevada water quality laws. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County argue that the State Engineer should take evidence at the hearing on these matters and then make his decision. The State Engineer agrees that whether there will be violations of the Clean Water Act or other Nevada water quality laws is relegated to another agency of government. The State Engineer finds NRS § 533.370(6) requires the State Engineer to consider environmental issues and the perspective the State Engineer is to focus on is that of hydrologic issues. The State Engineer finds that Nevada Revised Statute § 533.370(5) requires him to consider whether the use of water as proposed under an application for municipal use may conflict with existing rights or protectible interests in existing domestic wells and arguably that could include impacts to water quality; therefore, the State Engineer denies the request to dismiss at this time.

XI.

C. The Applicant moves to dismiss all protest claims related to right-of-way issues on the grounds that the issue is moot following the enactment of the Lincoln County Conservation, Recreation and Development Act of 2004 that directs the Secretary of the Interior to grant rights-of-way for the proposed pipeline and that completion of the right-of-way process is not a prerequisite for the State Engineer to approve the Applications. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County did not respond to this argument. The SNWA and the BIA stipulated to addressing this argument during the administrative hearing. The water right permit does not grant the permittee the right of ingress or egress to any land and such entry is required in order for a permittee to prove beneficial use of the water. The State Engineer finds while in some instances, such as a stockwater application on the federal lands, the State Engineer requires proof of access to the land before acting on an application. However, in other instances he issues a permit with a permit term that indicates the permit is conditioned on the applicant complying with other state, federal and local laws. The State Engineer finds that the lack of a specifically identified right-of-way does not prevent him from acting on the Applications and dismisses the protest claims.

XII.

D. The Applicant moves to dismiss all protest claims that allege the Applications are incomplete and fail to provide the statutorily required information. The Applicant argues that the State Engineer dismissed an identical protest claim in State Engineer's Ruling No. 5465. The protest claim addressed in Ruling No. 5465 was whether the amount of water requested was necessary and reasonable for municipal and domestic purposes and is not the same protest claim as asserted here. The NPS stipulated to withdraw this protest claim. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County did not respond to this argument. The State Engineer finds if the applications were incomplete they would have been rejected before being sent to publication and dismisses the protest claims.

XIII.

D.1. The Applicant moves to dismiss all protest claims that assert the Applications should be denied because of lack of comprehensive planning. The FWS withdrew this protest issue. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County did not respond to this argument. The State Engineer finds it has previously been held there is no provision in Nevada water law that requires comprehensive planning prior to granting a water right application; the claim is not supported by Nevada water law and dismisses the protest claims.

XIV.

D.2. The Applicant moves to dismiss all protest claims that assert the Applications should be denied because the Applicant has failed to include an independent, formal and publicly reviewable assessment of alternatives to the proposed project. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County did not respond to this argument. The SNWA and the BIA stipulated to addressing this argument during the administrative hearing. The State Engineer finds there is nothing in Nevada water law that requires an independent, formal, and publicly reviewable assessment of alternatives to the proposed project and dismisses the protest claims.

XV.

D.3. The Applicant moves to dismiss all protest claims that assert there is insufficient information to determine potential impacts from the appropriations alleging this is not a protest ground justifying denial of the Applications. The SNWA, the BLM and the BIA stipulated to addressing this argument during the administrative hearing. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club, John Tryon and White Pine County did not respond to this argument. The State Engineer finds he will not dismiss these protest claims prior to the evidentiary hearing, as the purpose of the hearing is to review what information is available and then make a decision.

XVI.

D.4. The Applicant moves to dismiss all protest claims that assert the Protestants have been denied due process of law because the SNWA has not provided the relevant information on the Applications as required by law. The Applicant argues that none of the Protestants have demonstrated any missing relevant information or any due process violation. No protestant responded to this argument. The State Engineer finds if the applications were incomplete they would have been rejected before being sent to publication and dismisses the protest claims.

XVII.

E. The Applicant moves to dismiss all protest claims that the proposed appropriations will reduce groundwater levels and that absent any specific evidence the Applications will cause an unreasonable lowering of the static water level the protest claims should be dismissed. The SNWA, the BLM, the BIA and the NPS stipulated to addressing this argument during the administrative hearing. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County argue they have presented evidence on this point. The State Engineer finds to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

XVIII.

F. The Applicant moves to dismiss all protest claims that assert the SNWA lacks the financial capability for developing and transporting the water to its intended beneficial use and alleges that none of the Protestants submitted any evidence on financial feasibility or lack thereof and that the issue is irrelevant. The SNWA and the BIA stipulated to addressing this argument during the administrative hearing. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra

Club and White Pine County did not respond to this argument. The State Engineer finds that, even if not raised as a protest issue, NRS § 533.370 requires that an applicant provide proof satisfactory of his financial ability and reasonable expectation to actually construct the works and apply the water to its intended beneficial use with reasonable diligence. The project proposed under these applications is not the same project the State Engineer considered in the hearing on the applications filed in Tikapoo Valley and Three Lakes Valley. The State Engineer finds to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

XIX.

G. The Applicant moves to dismiss all protest claims that allege other applications in the Spring Valley Hydrographic Basin have been denied. The SNWA argues that the previous denial of unrelated, factually dissimilar applications should not preclude the State Engineer from granting the subject applications. Protestant White Pine County did not respond to the portion of the motion. The State Engineer finds to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

XX.

H. The Applicant moves to dismiss all protest claims that allege that the approval of the Applications would sanction water mining. The Applicant alleges that where it demonstrates that the requested appropriation is limited to the perennial yield of the relevant groundwater basin, any claim that the use of water will sanction water mining is meritless and should be dismissed. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County argue they will provide evidence that the perennial yield will be exceeded. The State Engineer finds to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

XXI.

I. The Applicant moves to dismiss all protest claims that the approval of the Applications will encourage willful waste and inefficient use of water. The SNWA, the BIA and the NPS stipulated to addressing this argument during the administrative hearing. Protestants Abigail Johnson, Toiyabe Chapter of the Sierra Club and White Pine County did not respond to this argument. The State Engineer finds that the former State Engineer has previously ruled that the

local municipalities that comprise the SNWA are taking conservation seriously as part of their overall water management plan and are encouraging more efficient use of water through various conservation programs and dismisses the protest claim.

XXII.

J. The Applicant moves to dismiss all protest claims that attempt to incorporate by reference each and every other protest. No Protestant responded to this argument. The State Engineer finds that protests are verified by affidavit of the specific protestant and are personal to that protestant; therefore, one protestant cannot adopt and incorporate another protestant's protest and dismisses these protest claims.

XXIII.

K. The Applicant moves to dismiss all protest claims that reserve an un-quantified right to amend their protests as issues develop. The SNWA, the BLM and the NPS stipulated to addressing this argument during the administrative hearing. No other Protestant responded to this argument. The State Engineer finds NRS § 533.365 does not provide for amending protests and requires that a protest set forth with reasonable certainty the grounds of such protest at the time it is filed. The State Engineer finds amending protests has never been permitted and dismisses these protest claims.

XXIV.

L. The Applicant moves to dismiss the protest claim that the Applications should not be approved if the approval is influenced by the State Engineer's desire to assure there is sufficient water for subdivision maps already approved. The State Engineer finds an identical protest claim was previously addressed and the State Engineer found and now affirms that it is his responsibility and obligation to follow the law and dismisses the protest claim.

XXV.

M. The Applicant moves to dismiss the protest claims that allege the population projection numbers were unrealistically high. Protestants Abigail Johnson and White Pine County did not respond to this argument. The SNWA and the BIA stipulated to addressing this argument during the administrative hearing. The State Engineer finds an identical protest claim was previously addressed and the State Engineer found and now affirms that the population projections were not unrealistic and dismisses the protest claims.

XXVI.

N. The Applicant moves to dismiss the protest claims that allege that granting the Applications will destroy scenic and recreational values of the state. The Applicant alleges no evidence was submitted to support these protest claims and the State Engineer has previously dismissed such claims. The SNWA and the BIA stipulated to addressing this argument during the administrative hearing. Protestant White Pine County argues the State Engineer must consider impact on scenic and recreational values as part of his duty to consider the environmental and economic impacts under the interbasin transfer provision. The State Engineer finds while he does not believe the hydrologic focus of his environmental review considers scenic and recreational values, these factors may have some bearing on whether the use of the water is an appropriate long-term use that will not unduly limit the future growth and development of the basin from which the water is exported. The State Engineer finds to address this portion of the motion would require him to analyze the evidence before it has been presented at the administrative hearing and denies the request to dismiss.

XXVII.

O. The Applicant moves to dismiss the protest of Dr. Love, which in sum objects to the project because it is too big and is unprecedented. The Applicant's ground for dismissal is that the Protestant has failed to articulate any legitimate protest issue. Dr. Love's protest asserts that "[i]nasmuch as a water extraction and trans basin conveyance project of this magnitude has never been considered by the State Engineer, it is therefore impossible to anticipate all potential adverse effects without further study. Accordingly, the protestant reserves the right to amend the subject protest to include such issues as they develop as a result of further study." The State Engineer finds he has already ruled protests cannot be amended and will not dismiss the protest claim that additional studies may be warranted.

XXVIII.

The Applicant filed a Motion to Exclude Evidence in which it asserts that nearly every witness identified by the Protestants and nearly every piece of evidence they provided in their pre-filed documents should be excluded from the evidentiary hearing.

As to Protestant FWS, the Applicant moved to exclude the testimony of Kevin Kritz, Susan [sic Shawn] Goodchild, Annalaura Averill-Murray, Marianne Crawford, Steve Caicco, Kristine Wilson, and Jay Banta on the grounds that the witnesses were being presented as expert

witnesses and as such did not comply with the State Engineer's Intermediate Order and Hearing Notice. The Applicant also moved to exclude the testimony of Roger Congdon asserting that the testimony is irrelevant. However, the SNWA and the BLM, the FWS, and the BIA stipulated that: Kevin Kritz, Shawn Goodchild, Annalaura Averill-Murry, Marianne Crawford, Steve Caicco, Jay Banta will not be offered as expert witnesses, that their reports will not be offered as expert reports and they will not offer expert opinions. The parties did not agree as to the testimony of Kristine Wilson or Roger Congdon, but rather stipulated that any remaining arguments are preserved and no response need be made by the BLM, FWS or BIA to the motions as filed. The State Engineer finds based on the Stipulation he will not exclude the testimony at this time and denies this portion of the motion.

As to Protestant NPS, the Applicant moved to exclude the testimony of Tod Williams and Eric Lord. The SNWA and the NPS stipulated that Tod Williams and Eric Lord are not going to be offered as expert witnesses during the administrative hearing, their reports will not be offered as expert reports, and they will not offer expert opinions. The parties stipulated that any remaining arguments are preserved and to be made at the administrative hearing, accordingly, the NPS need not oppose the motions and the SNWA waived and will not assert any failure to file an opposition. The State Engineer finds based on the Stipulation he will not exclude any testimony or evidence at this time and denies this portion of the motion.

As to Protestant BLM, the Applicant moved to exclude protest issues alleging no evidence was submitted to support them, unpublished or draft documents should be excluded and moved to exclude the testimony of Robert Boyd, Paul Podborne and Brad Pendley. The SNWA and the BLM stipulated that Robert Boyd, Paul Podborne, Brad Pendley, and Ray Roessel are not being offered as expert witnesses, that their reports will not be offered as expert reports and they will not offer expert opinions and stipulated that any remaining arguments are preserved and no response need be made by the BLM to the motions as filed. The State Engineer finds based on the Stipulation he will not exclude any testimony or evidence at this time and denies this portion of the motion.

As to Protestant BIA, the Applicant moved to exclude many protest issues and all documentary evidence as no witness was identified for presentation of these documents. The SNWA and the BIA stipulated that the arguments are preserved and no response need be made by the BIA to the motions as filed. The State Engineer finds based on the Stipulation he will not exclude any testimony or evidence at this time and denies this portion of the motion.

As to Protestants represented by the WELC, in the motion to exclude, the Applicant also moved to dismiss protest claims as being unsupported by any evidence submitted in the pre-filed documentation. The Applicant moves to exclude any evidence connected with White Pine County's water resource plans. The State Engineer finds he will not prejudge the evidence and denies the request to dismiss these protest claims and finds that NRS § 533.370(6) requires the State Engineer to analyze whether the proposed action is an appropriate long-term use which will not unduly limit future growth and development in the basin from which the water is exported and the water resource plan might present evidence relevant to that consideration. The request to exclude is denied.

The Applicant moved to exclude witnesses identified for the WELC, those being John Bredehoeft, Ronald Lanner, Thomas Harris and Karen Rajala. The SNWA requested that John Bredehoeft's testimony be excluded because he failed to rely on actual data to form his own opinions and merely repeats conclusions of another witness. The State Engineer finds a witness does not have to provide solely independent analysis, but may review and comment on the work of another witness. The Applicant moved to exclude the testimony of Ronald Lanner on the grounds that it is duplicative and the witness is not qualified to offer the opinions offered. The State Engineer finds he is being asked to determine the qualifications of witnesses not yet offered and to review the evidence before it is even presented and denies the request to exclude. The Applicant moves to exclude the testimony of Thomas Harris on the grounds he is not being offered as an expert, so he should be precluded from offering an expert opinion on the consequences of the ground-water project on the local economy. The WELC responded by indicating Mr. Harris is being offered as an expert witness, but just did not use the word "expert" in its witness list. The State Engineer finds he is being asked to determine the qualifications of witnesses not yet offered and to review the evidence before it is even presented and denies the request to exclude. The Applicant moves to exclude the testimony of Karen Rajala on the grounds she does not appear to be qualified to testify on any subject matter presented on her

behalf. The WELC responded indicating that Ms. Rajala is qualified to testify on the subject matter presented. The State Engineer finds he is being asked to determine the qualifications of witnesses not yet offered and denies the request to exclude.

The Applicant moved to exclude all testimony related to species and environmental concerns. Nevada Revised Statute § 533.370(6) requires the State Engineer to consider whether the proposed action is environmentally sound as it relates to the basin from which the water is exported. The breadth of that review is subject for debate; however, the State Engineer finds the perspective he is to focus on is that of hydrologic issues. Once again, the Applicant is requesting the State Engineer to prejudge the evidence before it is even presented and finds he will not do so and denies the request to exclude.

XXIX.

Protestants represented by the WELC requested that the State Engineer assign specific hearing days to specific parties in order to benefit the public and parties by providing certainty as to when certain testimony and public comment will occur. While counsel for the WELC suggested that the first half day be devoted to motions and procedural matters, any pre-hearing motions were due to be filed in the Office of the State Engineer by July 7, 2006; therefore, there should not be any motions presented at the first day of the hearing. The State Engineer held a pre-hearing conference to specifically address, among other things, the amount of time contemplated for the administrative hearing. During the pre-hearing conference, the State Engineer asked every person participating how much time they anticipated was needed for the hearing. The Applicant's legal counsel indicated that no more than two weeks would be needed for the Spring Valley hearing, including the "whole lock, stock and barrel, our case, the protestants' cases and then opening and closing."² Everyone else agreed that two weeks should be sufficient. However, in order to assure adequate time for hearing and public comment, the State Engineer set aside three weeks for hearing and the State Engineer will not entertain any objection to the amount of time set for hearing.

² Transcript, pp. 29-32, public administrative hearing, January 5, 2006, official records in the Office of the State Engineer.

In the Intermediate Order and Hearing Notice dated March 8, 2006, the State Engineer ordered the Applicant to present its case first followed by the Protestants in the following order: WELC (for Abigail Johnson, Toiyabe Chapter of the Sierra Club, Katherine and William Rountree, John Tryon and White Pine County), BLM, FWS, BIA, NPS. While Nye County, the Moapa Band of Paiute Indians, Dan Love, Moriah Ranches, Inc. and Panaca Irrigation Company were also listed as Protestants presenting cases-in-chief, none of these parties pre-filed any witness list or documentary evidence; therefore, they will not be presenting cases. Additionally, the Moapa Band of Paiute Indians withdrew its protests to applications filed in Spring Valley.

The proposed order for the administrative hearing will be as follows, noting that the order is subject to change as may be necessary during the course of the administrative hearing or if settlement is reached with any of the parties prior to the administrative hearing. Additionally, time was allotted based on the pre-filed documents and the suggestion of WELC.

Monday, Sept. 11th - Preliminary matters and opening arguments, which are limited to 15 minutes. Opening arguments will be in the following order: Applicant, Western Environmental Law Center, Federal Agencies. Begin Applicant's case.

Tuesday, Sept. 12th – Applicant's case.

Wednesday, Sept. 13th – Applicant's case.

Thursday, Sept. 14th – Applicant's case.

Friday, Sept. 15th – Public comment from Ely, Baker, Carson City and Las Vegas beginning at 9:00 a.m. and continuation of Applicant's case.

Monday, Sept. 18th - Applicant's case.

Tuesday, Sept. 19th – Applicant's case.

Wednesday, Sept. 20th – Applicant's case

Thursday, Sept. 21st – WELC's case.

Friday, Sept. 22nd –WELC's case.

Monday, Sept. 25th -Federal Government's case.

Tuesday, Sept. 26th – Federal Government's case.

Wednesday, Sept. 27th – Federal Government's case.

Thursday, Sept. 28th –Federal Government's case.

Friday, Sept. 29th –Closing arguments in the following order: Western Environmental Law Center, Federal Agencies, Applicant, public comment from Carson City only on this day or at the end of the hearing, whichever occurs first.

In the Intermediate Order and Hearing Notice of March 8, 2006, the State Engineer indicated that one full day would be provided at the end of the administrative hearing for public comment. Please note the State Engineer has changed that schedule. The State Engineer has arranged teleconferencing for Friday, September 15th in order to allow those in eastern Nevada who do not want to travel an opportunity to present public comment via the Internet. **Two locations have been arranged for public comment from eastern Nevada on September 15, 2006. Ely – William Bee Ririe Hospital, Training Room, 1500 Ave. H., Ely, Nevada. Baker – Baker Elementary School Library.** As set forth in the March 8, 2006, Intermediate Order and Hearing Notice, teleconferencing has also been arranged for Las Vegas. Additionally, as set forth in the Intermediate Order and Hearing Notice of March 8, 2006, the State Engineer will accept written public comment for 30 days after the close of the administrative hearing.

CONCLUSIONS

I.

In the Motion to Dismiss Individual Protest Claims Regarding Spring Valley Applications and Memorandum in Support, the SNWA argues that the Nevada Supreme Court has determined that the State Engineer's public interest inquiry is limited to the consideration of matters arising from thirteen (13) guidelines contained within Nevada's water law statutes and rejected the attempts by the Pyramid Lake Paiute Tribe to force the State Engineer to conduct an environmental review of the applications that were at issue. The SNWA argues that to the extent protest issues are based on grounds not specifically identified by the applicable Nevada water law statutes, the protest issues should be summarily dismissed, and no evidence should be introduced regarding those protest points.

The State Engineer does not agree that the public interest inquiry is only limited to the thirteen guidelines set forth in *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 742 (1996). The State Engineer finds that while the Nevada Supreme Court noted that the guidelines adequately defined the public interest in that case, new laws have been enacted since that time, for example, the interbasin transfer statute, and established other criteria for the State Engineer's consideration. The State Engineer finds the Nevada Supreme Court's and the Ninth Circuit Court of Appeals' interpretation of the provision of NRS § 533.370(5), that mandates the State Engineer deny the use of water under an application if that use threatens to prove detrimental to the public interest, is that it needs to be read in the context of Nevada's water law and water policy statutes.

II.

In the Motion to Dismiss Protestants for Failure or Neglect to Prosecute Protests to the Spring Valley Applications with Reasonable Diligence, the SNWA moves to dismiss Protestants who have failed to affirmatively indicate the intent to participate in the administrative hearings. The SNWA argues that if the State Engineer allowed such persons to participate in the administrative hearing, the SNWA will be prejudiced because it will be forced to defend the Applications without insufficient notice as to the identity of the Protestants who will appear and participate in the hearings. Additionally, the Applicant moves to dismiss the protests of Nye County (all applications), Moriah Ranches (Applications 54013-54015, 54108) and Panaca Irrigation Company (Applications 54033-54005) on the grounds these Protestants have failed to provide any evidentiary basis in support of their claims.

On October 26, 2005, the State Engineer issued a Notice of Pre-hearing Conference to the Applicant and all Protestants. Attached to that notice was a form that requested every Protestant to indicate if they intended to attend and participate in the pre-hearing conference and to indicate if they intended to present a case-in-chief during the public administrative hearing. In response to the issues raised and matters discussed during the pre-hearing conference, on March 8, 2006, the State Engineer issued an Intermediate Order and Hearing Notice in which the State Engineer ordered that only those persons or entities that had indicated an intent to present a case-in-chief or participate in cross-examination are to be considered parties to the administrative hearing for the purpose of service of evidentiary documents, witness lists, notices and motions. Nevada Revised Statute § 533.365(3) provides that the "State Engineer shall consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem

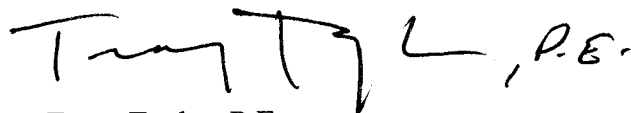
necessary to a full understanding of the rights involved.” Nevada Administrative Code § 533.170(2) provides that unless otherwise ordered for good cause shown, the failure of a party to attend a pre-hearing conference constitutes a waiver of any objection to the rulings made at the pre-hearing conference.

The State Engineer concludes that NRS § 533.365 requires him to consider the protests and denies the motion to dismiss Protestants; however, if a Protestant did not indicate an intent to present a case-in-chief or participate in cross-examination they will not be allowed to participate in the administrative hearing other than to present public comment.

RULING

The SNWA’s Motion to Dismiss Protestants for Failure or Neglect to Prosecute Protests to the Spring Valley Applications with Reasonable Diligence is hereby denied. The SNWA’s Motion to Dismiss Individual Protest Claims Regarding Spring Valley Applications and Memorandum in Support is denied in part and granted in part. The SNWA’s Motion to Exclude Evidence Related to Protests Against Applications in Spring Valley is hereby denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tracy Taylor, P.E.", with a stylized flourish at the end.

Tracy Taylor, P.E.
State Engineer

TT/SJT/jm

Dated this 4th day of
August, 2006.

CERTIFICATE OF SERVICE

I hereby certify that a copy of INTERMEDIATE ORDER NO. 4 was served by U.S. certified mail, postage prepaid, on Aug. 4, 2006 on the following:

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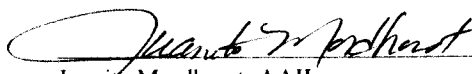
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